programs. Even assuming that this were the case, however, a careful review of the empirical analysis on which the proponents of the off-network restriction rest their case reveals that independent stations will not suffer the financial losses they claim. Moreover, even if they were to incur losses of the magnitude claimed, such losses would not be significant for a majority of independent stations, and certainly would not result in "most . . . independent stations go[ing] dark."[54]

LECG predicts that independent stations will suffer a 25 percent audience and revenue decline during the access period if the off-network restriction is repealed.[55] As the reply comments of Professors Williamson and Woroch demonstrate in detail, however, the empirical work that underlies this prediction is so seriously flawed as to render it unusable. A few examples of the errors catalogued by Professors Williamson and Woroch -- "any one of which invalidates [LECG's] conclusions"[56] -- illustrate why any reliance on LECG's report would be misplaced.

First, LECG's estimate of the ratings loss that independent stations will purportedly experience if the off-network restriction is repealed is grossly inflated. This is principally the result of the fact that LECG consistently (and incorrectly) averages its data across both stations and markets. Using unaveraged data, Williamson & Woroch's respecification of LECG's model predicts a drop in ratings of only 0.78 points.[57]

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54 Viacom Comments at 5.

55 LECG Report at 51.

56 Williamson & Woroch Reply at 31.

57 *Id.* at 34.

Second, LECG never reports the "confidence intervals" surrounding its estimates of ratings loss. Confidence intervals simply represent the "margin of error" in LECG's statistical analysis. Thus, for example, while LECG's model may yield a point estimate of the projected ratings drop of 2.34 points, the relevant confidence interval may be quite large, ranging from a somewhat higher ratings loss to a ratings *gain*. In such a case, the only conclusion one could draw with confidence is that the ratings effect of the removal of the off-network restriction will fall *somewhere* within that range. Although LECG chooses not to report its confidence intervals, Professors Williamson and Woroch explain that they are likely to be quite large.[58] Stated differently, the Commission cannot confidently conclude, based on LECG's empirical work, that eliminating the off-network restriction will have *any* effect on the ratings of independent stations.[59]

Third, LECG derives its estimate of the ratings effect of removing the off-network restriction from variables that are designed to measure the effects of changes in the marketplace over time on changes in independent stations' ratings. Of course, there have been a number of significant changes in the television industry over the last 25 years, many of which have likely had a measurable effect on independent stations' ratings. Yet LECG makes no effort to distinguish among these effects. It simply *assumes* that all of the observed

58 Williamson & Woroch Reply at 34.

59 Indeed, as Professors Williamson & Woroch explain, the LECG data, at best, supports the conclusion that established and successful independent stations may experience some loss of ratings over a period of years. It provides *no* evidence, however, that marginal stations will experience such declines. Even these results are suspect, however, for the reasons set forth in the Williamson and Woroch reply. Williamson & Woroch Reply at 30-31.

differences in independent stations' ratings are attributable to PTAR. This assumption is patently erroneous.[60]

Even if LECG's predictions concerning independent stations' ratings and revenue loss were reliable, however, that loss simply would not represent a significant economic threat to the majority of independent stations. INTV claims, based on an informal survey of independent stations, that revenues from the the access hour constitute, on average, 16.2 percent of an independent station's total revenues.[61] Using LECG's erroneous estimate of a 25 percent reduction in access hour revenues, this means that, on average, independent stations might lose four percent of total station revenues if the off-network restriction is repealed.[62]

There is no basis to conclude that a four percent revenue loss, even assuming it would occur, would imperil the independent television industry. In 1993, the most recent year for which data is available, independent stations had an average positive cash flow of over $6 million (which constitutes 26 percent of their gross advertising revenues).[63] Thus, even using LECG's erroneous assumptions of revenue loss, independent television stations would still have, on average, a positive annual cash flow of approximately $5.3 million (which constitutes

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60 Williamson & Woroch Reply at 31-33.

61 INTV Comments at 44.

62 As explained above, the 25 percent revenue reduction figure is overstated. Indeed, independent stations that responded to INTV's informal survey estimated that if they replaced off-network programs with top quality first-run programs, they would suffer a 5.7 percent reduction in access hour revenues. INTV Comments at 52. *This would produce an average total station revenue loss of only one percent.*

63 *1994 NAB/BCFM Television Financial Report* 147 (1994). LECG uses accounting profitability numbers purportedly to show that independents are on the edge of the financial precipice. Accounting data, however, is a notoriously poor measure of profitability. *See* A. Lawrence Kolbe *et. al., The Cost of Capital* 47 (1984). Cash flow data provides a much better measure.

23 percent of their gross advertising revenues).[64] Nothing in the record suggests that such a loss would have a significant impact on the independent television industry.

### B. Preservation Of The Off-Network Restriction Is Not Critical To The Development Of Incipient Networks

Because elimination of the off-network restriction will not impose significant financial harm on independent stations, Viacom's concern that elimination of the off-network restriction will cause "most of . . . [the independent] stations to go dark," and thereby "stymie the growth of emerging networks like UPN,"[65] is unwarranted. Viacom, relying upon the LECG analysis, asserts that the health of emerging networks is precarious due to the fact that the majority of their affiliates are UHF stations that earn less money than VHF stations.[66]

As Professors Williamson and Woroch explain in their reply comments, however, LECG's findings with respect to the correlation between ratings and channel frequency are flawed.[67] When the LECG model is modified to take into account the age of stations, the model indicates that historically (*i.e.,* when cable penetration was significantly lower) stations were able to overcome the UHF handicap in 12.5 years -- that is, in less than half the time that the off-network restriction has been in effect. More significantly, the model shows that the length of time it takes a station to overcome the "UHF handicap" has fallen sharply over time (as cable penetration has increased). Today this handicap dissipates in less than three years.

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64 This calculation assumes that expenses would remain constant. In fact, expenses would probably drop under the LECG assumptions as stations substituted less expensive programs.

65 Viacom Comments at 5.

66 *See id.* at 10.

67 Williamson and Woroch Reply at 36.

Even under the LECG model, therefore, independent stations have had more than enough time to mature. Elimination of the off-network restriction will not, therefore, harm the development of incipient networks.

In any event, the fact that the average independent station, for whatever reason, is not as profitable as the average network affiliate is beside the point. Infant industry regulation is designed to "jump start" an industry. At some point, if the efficiency gains from aiding new entrants are to be realized, those entrants will have to stand on their own and compete without the benefit of regulation. For independent stations, that time has come.[68]

Viacom attempts to downplay the significant growth and maturation of the independent television industry by portraying the majority of independent stations as teetering on the brink of financial disaster. Viacom states that "the average independent station . . . was marginally profitable in 1989."[69] The Commission cannot, however, base a decision in 1995 on 1989 data. This is particularly true, where, as here, the state of the industry has changed, and continues to change, so dramatically. Today, the average independent station is more than "marginally profitable." Indeed, as stated above, in 1993 (the most recent year for which data is available) independent stations had an average positive cash flow in excess of $6 million.[70] This trend toward greater profitability of independent stations shows no signs of abating.[71]

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68 *See* Coalition Comments at 24-26. For example, the years since 1970 have seen a five-fold increase in the number of independent stations. In addition, many of these stations are part of large station groups, which strengthens them financially.

69 Viacom Comments at 12.

70 *See supra* at 25 and n.63.

71 Tribune Co., for example, which owns seven independent television stations, reported that its revenue from those stations for the second quarter of 1994 was up 11 percent from the previous year.
(Footnote 71 Continued)

The Coalition does not mean to suggest that the viability of the incipient networks should be of no concern to the Commission. Our point is only that the elimination of the off-network restriction poses no threat to their viability.

### C. The Off-Network Restriction Has Arbitrarily Depressed Prices For Off-Network Programming

The off-network restriction has arbitrarily depressed prices for off-network programs. Contrary to Viacom's assertion, the fact that two recent runaway hits, *Home Improvement* and *Seinfeld,* earned high syndication fees says nothing about the syndication fees earned by the vast majority of off-network syndicated programs.[72]

Falling syndication fees are reflected in shows at the margin, such as *Anything But Love,*[73] not shows at the top, such as *Seinfeld.* From the producers' perspective, it is the average or marginal show that is the most important; producers base their production decisions on the fees being earned by these shows -- not the runaway hits. Producers focus on syndication fees for the average show because these are the fees that they are more likely to collect -- provided, of course, they beat the formidable odds and make it to syndication at all. The blockbuster hits are so rare that they cannot be relied upon by producers in gauging their potential return. While everyone aspires to produce the hit, no one can realistically count on one.

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(Footnote 71 Continued)
Laureen Miles, *Tribune Co., Which Owns Seven Independent Stations, Reported A Second Quarter Increase In Operating Profits,* Mediaweek, Sept. 19, 1994 at 9.

72 *See* Viacom Comments at 33-35.

73 *See* Coalition Comments at 18.

Consequently, the analysis of changes in syndication fees for off-network shows must concentrate on the fees for the average or marginal show. In Appendix J to the Viacom Comments, Viacom designates shows as "A," "B," and "C," presumably categorizing them according to the relative demand for these shows. As reported by Viacom, the average syndication fees for the average or marginal programs, those graded B and C, have fallen 21 percent from $700,000 in 1989 to $550,000 in 1994.[74] Moreover, this trend continued into 1995 as the average syndication fees for B and C shows fell even further to $483,333, representing a 31 percent decline from 1989 levels.[75] This significant drop in average syndication fees illustrates the severe financial pressure that is being felt by producers of network programs.

## II. OPPONENTS OF THE NETWORK RESTRICTION HAVE FAILED TO SHOW THAT THERE IS ANY COST THAT OUTWEIGHS ITS CONTINUED BENEFITS

In the comments filed earlier by the Coalition and by Professors Williamson and Woroch, we demonstrated how the network restriction continues to benefit the public interest in diversity. We also explained how eliminating the network restriction would undermine the benefits gained from elimination of the off-network restriction. Opponents of the restriction

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74 In 1993, the average syndication fee for B shows was $833,000. In that year, unlike all of the previous years, no C show was sold. Viacom Comments at Appendix J.

75 *Id.* While Viacom includes the syndication fees for the blockbuster hits *Seinfeld* and *Home Improvement*, it fails to include B shows that were syndicated this year in its analysis of the falling syndication fees for off-network programs. These shows were *Blossom*, *Dinosaurs* and *Step-by-Step*, each of which received cash license fees of approximately $250,000 per episode. These fees do not include barter income that the syndicator will also earn from these shows.

have failed to identify any costs of the restriction that outweigh these benefits. Indeed, NBC has indicated that it could live with the network restriction for another three years.[76]

### A. The Network Restriction Has Not Caused Any Loss In Welfare

According to the networks' economic consultants, Economists Incorporated, the network restriction has caused stations to air less expensive and lower quality programming in the access period, diminishing viewer welfare.[77] As Professors Williamson and Woroch explain, however, this analysis does not withstand careful scrutiny.[78] Even if one were to assume that the methods used to calculate the purported welfare loss had some validity, the estimates they produce are so imprecise that they prove nothing. Moreover, the model itself is unreliable because it is based on outdated assumptions concerning the types and number of programs delivered by cable systems, cable subscription behavior and consumer viewing habits.

Economists Incorporated also compares the number of households using televisions (HUT levels) during 7:30-8:00 p.m. (Eastern) on Tuesdays in the 1971/72 television season with the 7:30-8:00 p.m. (Eastern) HUT levels for all other weekdays, in an effort to show that the network restriction has had a negative effect on viewer welfare. This comparison was made because the networks continued to program the Tuesday 7:30-8:00 p.m. time slot during that season. Economists Incorporated argues that the higher HUT levels on

76 NBC Comments at 40.

77 Economists Incorporated Report at 31-33.

78 *See* Williamson & Woroch Reply at 40-43.

Tuesdays (the "Tuesday Effect") prove that the network restriction resulted in the broadcast of less popular programming and diminished viewer welfare. Professors Williamson and Woroch demonstrate, on the contrary, that the "Tuesday effect" is merely a reflection of aggressive network programming patterns, not a rejection of access hour programming. This conclusion is reinforced by the fact that nearly half a million additional households watched programs during the access period in 1971-72, *after* the network restriction took effect, than watched in the preceding two seasons.[79]

The findings of Professors Williamson and Woroch concerning the effect of the network restriction are confirmed by (1) the programming plans of the networks themselves and (2) the position of the network affiliates in this proceeding. If the network restriction has resulted in the loss of viewership the network economists claim, then one would expect that the networks and their affiliates would be joined in opposition to the network restriction, and poised to resume network programming in the access period the moment the restriction is lifted. On the contrary, over 650 network affiliates, through the Network Affiliated Stations Alliance, *oppose* repeal of the network restriction. Moreover, none of the networks has indicated any intention to program the access hour. Indeed, CBS has expressly stated the opposite: it has no present plans to program the access hour.[80]

The inescapable conclusion to be drawn from this evidence is that neither the networks nor their affiliates believe that they would regain lost viewers, and thereby enhance

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79 *Id.* at 41.

80 CBS Comments at 17.

their profits, by broadcasting programming in the access hour. The welfare loss the network economists attribute to the network restriction is illusory.

### B. The Network Restriction Should Be Retained Because The Networks Are Able Effectively To Dictate Affiliate Program Choices

In its Notice, the Commission asks whether, given recent marketplace developments, it can "assum[e] that the networks lack the power to force their affiliates to make uneconomical programming decisions."[81] The networks argue that the Commission must reach this conclusion. According to the networks, they "do not dictate affiliate programming choices."[82]

As the Coalition explained in its Comments, however, this kind of statement ignores the reality of the marketplace. While it is true that the network affiliation agreements do not impose legally binding obligations on network affiliates to accept network programming, the practical effect of the terms imposed is that, at least during prime time, the networks effectively dictate their affiliates' programming decisions.

Indeed, if, as the networks assert, they have no ability to dictate the programming choices of their affiliates, then one would expect the affiliates to support (or at least be indifferent to) elimination of the network restriction. That is not the case, however. The affiliates have consistently *opposed* elimination of the network restriction because it "continues to protect the ability of local stations to program to the needs and interests of their local

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81 *Review of the Prime Time Access Rule Section 73.658(k) of the Commission's Rules,* 9 FCC Rcd 6328, 6353 (1994).

82 NBC Comments at 26. *See also* ABC Comments at 7-8; CBS Comments at 17.

communities."[83] Tellingly, the networks never attempt to explain the position taken by their affiliates.

Ignoring the affiliates' position, NBC asserts that to the extent that the networks ever had the ability to dictate affiliate program choices, they no longer have that ability because "the relative position of the networks and their affiliates has changed dramatically" and, as a result, "the balance [has shifted] in favor of the affiliates."[84] This alleged power shift, according to networks, has been precipitated by the fact that "affiliates now have many other programming options, including the wealth of first-run programs available in the marketplace," and that, in addition to the established networks, Fox, UPN and The WB now also vie for affiliates.[85]

The fact that these three entities did not exist in 1970 has not shifted the balance of power between the established networks and their affiliates, however. UPN and The WB are, as the Commission appropriately describes them, "incipient," and thus do not yet offer a viable alternative to affiliation with one of the established networks. Neither UPN nor The WB has lured away any affiliate of ABC, CBS, NBC or Fox. While Fox has persuaded a number of established network affiliates to switch their affiliation, this does not constitute evidence that affiliates will switch affiliations simply because they are dissatisfied with

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83 Network Affiliated Stations Alliance Comments at 3 (June 14, 1994) (hereinafter "NASA Comments"). *See also* Network Affiliated Stations Alliance Comments at 1 (March 7, 1995) ("By ensuring that affiliates will be able to exercise their editorial discretion to program locally one of the four hours of prime time, free of network clearance pressures, the [network restriction] provides an important safeguard for local station autonomy.").

84 NBC Comments at 27-28.

85 *Id. See also* ABC Comments at 7-8 ("The alternative programming available to stations prevents networks from dictating program choices to affiliates.").

programming decisions made by their networks. Indeed, in part as a reaction to the Fox switches, Fox and the established networks have entered into a number of long-term affiliation agreements -- some as long as ten years[86] -- which makes further affiliation switches unlikely.[87]

Similarly, the fact that there are now more programming options available to affiliates has not shifted the balance of power between the networks and their affiliates. As indicated by their clearance levels, the network affiliates rarely avail themselves of these other programming options. Although the networks argue in their comments that their affiliates frequently preempt the network feed, they are unable to provide any examples of prime time series that were regularly preempted.[88]

Thus, as the network affiliates told the Commission, "the changes in the broader marketplace, though substantial, have not altered the relative balance of power between networks and affiliates."[89] The network restriction must be retained in order to promote

86 *See* Diane Mermigas, *A Network of Change: NBC's Robert Wright Navigates New TV Era,* Electronic Media, Oct. 10, 1994 at 1.

87 The networks are reportedly expecting less preemption in exchange for the longer terms. *See* David Tobenkin, *Nets Want Clearance Bang for Bucks; Hope Longer Affiliation Deals Will Translate Into Fewer Schedule Defections,* Broadcasting & Cable, Nov. 7, 1994 at 20. Thus, these longer affiliation agreements will likely result in an even lower affiliate preemption rate.

88 Indeed, their only preemption examples are for *non*-prime time programs. CBS, for example, cites *The Late, Late Show With Tom Snyder* as an example of affiliate preemption. CBS Comments at 17. CBS concedes that its "main recent difficulty with delayed clearances has been in the late night daypart." *Id.* at n.31. CBS further concedes that clearance problems experienced by ABC and NBC have concerned those networks' daytime schedules. *Id.*

89 NASA Comments at 2-3.

program diversity and preserve the ability of affiliates in all markets to select the programming that they believe best suits the viewing preferences of their audiences.[90]

### C. The Networks Should Not Be Allowed To Syndicate Programs In The Access Hour Because To Do So Would Vitiate The Network Restriction

CBS suggests that if the Commission does not eliminate the network restriction entirely, then the Commission should at least allow the networks to syndicate network-produced first-run programming during the access period.[91] The Commission should reject this suggestion. In 1991, the Commission concluded that the network restriction encompasses the networks' syndication of first-run programming. The Commission reasoned that a contrary interpretation would effectively allow the networks to subvert the purpose of the network restriction.[92] As the Commission stated, its "interpretation of the coverage of this rule [is] consistent with the meaning, purpose and intent of the prime time access rule."[93] Nothing has changed since 1991 to alter that conclusion. Accordingly, the Commission should reject

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90 The constitutionality of the network restriction was upheld in *Mt. Mansfield Television, Inc. v. FCC,* 442 F.2d 470 (2d Cir. 1971). The law upon which that decision was based has not changed. *Cf. Turner Broadcasting System, Inc. v. FCC,* 114 S. Ct. 2445 (1994) (refusing to address the continued validity of *Red Lion Broadcasting Co. v. FCC).*

91 CBS Comments at 26-27. NBC appears to seek similar relief. NBC Comments at 40.

92 Indeed, if the Commission repeals the off-network restriction, allowing the networks to syndicate first-run programming during the access period would undermine the benefits of that action. As the Coalition explained in its comments, eliminating the off-network restriction will restore the "shelf-space" for off-network programming that the restriction has artificially constrained, and thus encourage greater investment in network prime time programming. That benefit will be vitiated, however, if the networks are able to program that hour -- regardless of whether the networks distribute the programs via their network feed or first-run syndication.

93 *Evaluation of the Syndication and Financial Interest Rule,* 7 FCC Rcd 345, 381 (1991). *See also "Memories . . . Then and Now,"* 6 FCC Rcd 5013 (1991).

CBS' suggestion that it be allowed to enter the access period through the back door of first-run syndication.

## CONCLUSION

For all the reasons set forth above, the Commission should eliminate the off-network component of PTAR and retain the network component of the rule.

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Counsel for the Coalition to
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May 26, 1995

# EXHIBIT A

## COALITION TO ENHANCE DIVERSITY

### PRODUCERS

Michael Abrams
(Michael Abrams Productions)
David Babcock
(David Babcock Productions)
Warren Bell
(Wesst, Inc.)
Robert L. Boyett
(Miller-Boyett Productions)
Marc Brull
(Mantissa Productions, Inc.)
Stephen J. Cannell
(Stephen J. Cannell Productions)
Susan Harris
(Witt-Thomas-Harris Productions)
Michael Jacobs
Larry Levin
(Rock Island Productions)
MCA Inc.
Thomas L. Miller
(Miller-Boyett Productions)
Fred Silverman
(Fred Silverman Co.)
Tony Thomas
(Witt-Thomas-Harris Productions)
Ehric Van Lowe
(Sweet Lorraine Productions)
Vin DiBona Productions
The Walt Disney Company
Paul Junger Witt
(Witt-Thomas-Harris Productions)
Bob Young

## TRADE UNIONS

Screen Actors Guild
Writers Guild of America, east
Writers Guild of America, west

## INDIVIDUALS

Richard Frank

## BROADCASTERS

Burnham Broadcasting Company

| | |
|---|---|
| WALA-TV (NBC) | Mobile, AL |
| WBAK-TV (ABC) | Bakersfield, CA |
| KHON-TV (NBC) | Honolulu, HI |
| WVUE-TV (ABC) | New Orleans, LA |

Hubbard Broadcasting

KVOA Communications, Inc.

Providence Journal Company

| | |
|---|---|
| WHAS-TV (ABC) | Louisville, KY |
| WCNC-TV (NBC) | Charlotte, NC |
| KMSB-TV (FOX) | Tucson, AZ |
| KASA-TV (FOX) | Albuquerque/Santa Fe, NM |
| KING-TV (NBC) | Seattle, WA |
| KGW-TV (NBC) | Portland, OR |
| KREM-TV (CBS) | Spokane, WA |
| KTVB-TV (NBC) | Boise, ID |
| KHNL-TV (FOX) | Honolulu, HI |

Pulitzer Broadcasting Co.

| | |
|---|---|
| WESH(TV)(NBC) | Daytona Beach/Orlando, FL |
| KCCI-TV (CBS) | Des Moines, IA |
| WLKY-TV (CBS) | Louisville, KY |
| WDSU-TV (NBC) | New Orleans, LA |
| KETV(TV)(ABC) | Omaha, NE |
| KOAT-TV (ABC) | Albuquerque, NM |
| WXII(TV)(NBC) | Greensboro/High Point/Winston-Salem, NC |
| WGAL(TV)(NBC) | Lancaster, PA |
| WYFF-TV (NBC) | Greenville/Spartonburg, SC/Asheville, NC |

Scripps Howard Broadcasting Co.

| | |
|---|---|
| KNXV-TV (ABC) | Phoenix, AZ |
| WFTS(TV) (ABC) | Tampa-St. Petersburg, FL |
| WPTV(TV)(NBC) | West Palm Beach, FL |
| WMAR-TV (ABC) | Baltimore, MD |
| WXYZ-TV (ABC) | Detroit, MI |
| KSHB-TV (NBC) | Kansas City, KS |
| WCPO-TV (CBS) | Cincinnati, OH |
| WEWS(TV)(ABC) | Cleveland, OH |
| KJRH(TV)(NBC) | Tulsa, OK |

## CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that true copies of the foregoing **REPLY COMMENTS OF THE COALITION TO ENHANCE DIVERSITY** were mailed first class postage prepaid, unless otherwise indicated below, to the following individuals on this 26th day of May 1995:

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